Nos. 86-622 and 86-737

Supreme Court, U.S.
FILED
MAY 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EUGENE TRAYNOR,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS, and VETERANS' ADMINISTRATION,

Respondents.

JAMES P. McKELVEY,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS, and VETERANS' ADMINISTRATION,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND CIRCUIT AND THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE NATIONAL COUNCIL ON ALCOHOLISM, INC.

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Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub.L. No. 95-602, §§119, 122(a)(6), 92 Stat. 2982, 2984-5 (1978)..... 33, 34

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43 Fed. Reg. 2132, 2134 (1978)..... 32

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S. Rep. No. 91-1069, 91st Cong., 2d Sess. 1, 3 (1970)..... 29

S. Rep. No. 96-103, 96th Cong., 1st Sess. 3-4, 15, reprinted in 1979 U.S. Code Cong. & Ad. News, 2681, 2682-83, 2694..... 29

BOOKS AND ARTICLES

American Medical Association, Manual on Alcoholism (Chicago, 1957)...11, 15

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders-III (APA, Washington, D.C. 1980)..... 11

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S. Blume, M.D., "The Disease Concept of Alcoholism, 1983", 5 J. of Psychiat. Treatment and Evaluation 471 (1983)..... 6, 10

M. Bohman, S. Sigvardsson & R. Cloninger, "Inheritance of Alcohol Abuse: Cross-Fostering Analysis of Alcoholic Men", 38 Arch. Gen. Psychiat. 861 (1981)..... 25

M. Bohman, S. Sigvardsson & R. Cloninger, "Maternal Inheritance of Alcohol Abuse: Cross-Fostering Analysis of Adopted Women", 38 Arch. Gen. Psychiat. 965 (1981).. 25

R. J. Cadoret, C.A. Cain, & W. Grove, "Development of Alcoholism in Adoptees Raised Apart from Biologic Parents," 37 Arch. Gen. Psychiat. 561 (1980)..... 24

L. Carroll, Through the Looking Glass, reprinted in Alice in Wonderland and Other Favorites, (New York: Washington Square Press, 1951)... 6

National Council on Alcoholism & American Medical Society on Alcoholism, "Definition of Alcoholism", 85 Annals of Internal Medicine No. 6 (1976)... 12

M. A. Schuckit, M.D., "Genetic and Clinical Implications of Alcoholism and Affective Disorder," 143 Am. J. Psychiatry 140 (1986)....18, 22

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U.S. Department of Health and Human Services, 6th Special Report on Alcohol and Health, (Washington, D.C. 1986)..... 10

J. Winoker, T. Reich, J. Rimmer et al., "Alcoholism: III Diagnosis and Familial Psychiatric Illness in 259 Alcoholic Probands," 23 Arch. Gen. Psychiat. 104 (1970).. 23

S. Zimberg, M.D., The Clinical Management of Alcoholism (New York: Brunner/Mazel 1982).....14, 19, 26

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BRIEF OF AMICUS CURIAE NATIONAL COUNCIL ON ALCOHOLISM, INC.

STATEMENT OF INTEREST[1]

The National Council on Alcoholism (NCA) is a nation-wide independent, non-profit organization whose mission is to combat alcoholism and related problems by encouraging the prevention and treatment of this disease, by increasing public awareness and understanding about its nature and consequences, and by promoting the development of sane and humane public policies for resolving the many tragic problems that alcoholism creates in this society.[2]

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[1] Pursuant to Rule 36 of the Supreme Court Rules, written consent to file this brief has been obtained by counsel of record for all parties. The letters of consent have been filed with the Clerk of Court.

[2] NCA's major programs include alcoholism prevention and education, public information, public policy advocacy, conferences and publications. NCA's network of 190 state and local nonprofit affiliates conduct similar activities in

(continued...)

The cases of Traynor v. Turnage and McKelvey v. Turnage present issues of paramount concern to NCA. Since its founding in 1944, NCA has sought to end the stigma that historically has been attached to alcoholism, and to foster understanding of the fact that alcoholism is neither misconduct nor a moral failing, but a complex and insidious medical condition that can and must be treated. NCA has long supported all necessary efforts to enhance the effective treatment of the disease of alcoholism and ensure the fair treatment of alcoholics -- especially

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[2](...continued)
their areas and provide information and referral services to families and individuals seeking help with an alcohol or other drug problem. NCA sponsors National Alcohol Awareness Month in April and National Fetal Alcohol Syndrome Awareness Week. NCA also conducts the National Alcoholism Forum, the nation's oldest general-interest conference on alcoholism.

those who have successfully arrested their illness.

The Veterans' Administration (VA) regulation whose classification of alcoholism is at issue in these cases strikes at the heart of NCA's 43-year effort to dispel the myths and misunderstanding that persist in some quarters about the causes and nature of alcoholism.

By classifying "primary" alcoholism as "willful misconduct", the VA regulation (38 U.S.C. § 3.301(c)(2)) categorically excludes an entire group of veterans who have successfully recovered from alcoholism from participating in the VA's educational assistance benefits program. (See 38 U.S.C. § 1662(a)(1)). This archaic, erroneous and stigmatizing classification is in direct conflict with both current medical understanding and the clear congressional mandate not to

discriminate on the basis of handicap, contained in § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982).

The VA's regulation reflects precisely the sort of misperceptions about alcoholism that in the past have posed the worst barriers to the effective prevention and treatment of this disease. Its continuing existence thwarts the successful treatment and rehabilitation of alcoholics, and throws into jeopardy the legal rights of persons and families who have already suffered too much from alcoholism and its devastating consequences.

For these reasons, NCA files this brief amicus curiae. Its purpose is to urge the Court to recognize the true nature of alcoholism, as reflected in two important Acts of Congress, and to give real meaning to the nondiscrimination mandate of § 504 as it affects those

veterans whose handicap is a history of alcoholism successfully overcome.

SUMMARY OF ARGUMENT

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I chose it to mean -- neither more nor less."
>
> "The question is," said Alice, whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be the master, that is all".[3]

Alcoholism is a disease. This fact has been recognized by all major national (and international) medical, psychiatric, alcoholism treatment and

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[3] Lewis Carroll, Through the Looking Glass, (Ch. 6: Humpty Dumpty), reprinted in Alice in Wonderland and Other Favorites, Washington Square Press (New York 1951) at 190. This was quoted by S. Blume, M.D., in "The Disease Concept of Alcoholism, 1983", 5 J. of Psychiat. Treatment and Evaluation 471 (1983) (reviewing societal perceptions and medical understanding of alcoholism over the centuries).

public health organizatons during the past thirty years. (Point I)

The fact that alcoholism is a disease has also been recognized by the Congress in two statutes it has enacted in the last seventeen years, the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 and the Rehabilitation Act of 1973. In the first, Congress defined alcoholism as "an illness requiring treatment and rehabilitation" (42 U.S.C. § 4541 (1982)). In the second, Congress defined alcoholism as a "handicap" within the meaning and protection of § 504 (29 U.S.C.A. §§ 794, 706(8)(West Supp. 1987). (Point II)

The Veterans' Administration regulation conclusively defining "primary" alcoholism as nothing more than "willful misconduct" (38 C.F.R. § 3.301 (c)(2))

cannot be squared with the fact that alcoholism is a disease or the laws that Congress has passed defining alcoholism as an illness to be treated and classifying those who suffer from it as handicapped individuals to be protected from discrimination. In this debate over the meaning of words, Congress is the master.

The VA's regulation defining alcoholism as "willful misconduct" violates § 504 of the Rehabilitation Act. The VA's definition is based upon the very sort of archaic attitude toward the handicap of alcoholism that § 504 was designed to overcome. The lower court's reliance on "popular moral philosophy" and "general societal perceptions" about alcoholism to uphold the VA's regulation in effect endorsed discrimination against alcoholics simply because of the "prejudiced fears or ignorance of others."

School Board of Nassau Co., Fla. v. Arline, 107 S.Ct. 1123, 1129 (1987). Arline makes clear that Congress intended that no one may, by focusing on one aspect of a handicap, take it outside the scope of § 504. (Point III)

POINT I: ALCOHOLISM IS NOT WILLFUL MISCONDUCT.

A. Alcoholism Is Recognized and Classified as a Disease by National and International Medical, Psychiatric and Public Health Authorities

The fifty years that have passed since Prohibition have seen the phenomenal growth of medical and scientific knowledge about the etiology and nature of alcoholism. This increased knowledge has produced a consensus, shared by medicine, psychiatry and public health authorities, that alcoholism is a disease, as well as a major national health problem.

The medical community now understands alcoholism to be a complex, progressive and insidious disease characterized by increasing dependence upon consumption of the drug alcohol, and by impairment in social or occupational functioning. This understanding is reflected in the growing awareness in the public at large that alcoholism is an illness, one that afflicts some ten million adult Americans.[4]

Thus alcoholism was recognized as a medical disorder by the World Health Organization in 1951, see World Health Organization, International Classification of Diseases Ninth Edition (ICD-9)(1977)

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[4] See 42 U.S.C. § 4541(a)(2) (1982) (Congressional finding); U.S. Department of Health and Human Services, 6th Special Report on Alcohol and Health, (Washington, D.C. 1986). See also Blume, supra note 1, at 472 (noting results of 1982 Gallup survey which found that 79% of adult Americans agreed that "alcoholism is a disease and should be treated as a disease").

(No. 303, alcohol dependence syndrome); and by the American Medical Association in 1956, see, American Medical Association, Manual on Alcoholism (1957). The American Psychiatric Association (APA) has also recognized alcoholism as a diagnosable and treatable illness for many years. It has classified alcoholism as a distinct category in every edition its Diagnostic and Statistical Manual of Mental Disorders (DSM) since 1953. The diagnostic critera for alcoholism, as set forth in the current edition of this manual, the Diagnostic and Statistical Manual-III (1980), are commonly acceped and widely used by the medical profession; and the most recent update of this manual, the Diagnostic and Statistical Manual-IIIR (1987), continues this practice.[5]

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[5] See DSM-III (1980), No. 303.9x (alcohol dependence). The Committee on

(continued...)

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[5](...continued)
Definitions of the National Council on Alcoholism and the American Medical Society on Alcoholism also prepared a definition of alcoholism which was approved by the National Council on Alcoholism's Public Policy Committee in 1976. See 85 Annals of Internal Medicine, No. 6 (1976). This definition provides as follows:

> Alcoholism is a chronic, progressive, and potentially fatal disease. It is characterized by tolerance and physical dependency or pathologic organ changes, or both -- all the direct or indirect consequences of the alcohol ingested.
>
> 1. "Chronic and progessive" means that the physical, emotional, and social changes that develop are cumulative and progress as drinking continues.
>
> 2. "Tolerance" means brain adaptation to the presence of high concentrations of alcohol.
>
> 3. "Physical dependency" means that withdrawal symptoms occur from decreasing or ceasing consumption of alcohol.
>
> 4. The person with alcoholism cannot consistently predict on any drinking occasion the duration of the episode or the quantity that will be consumed.

(continued...)

B. The Etiology, Nature and Clinical Course of Alcoholism

Millions of adult Americans suffer from alcoholism. However, it is clear that the simple act of drinking -- by itself -- does not itself make an individual an alcoholic. Of all the people who drink, only about five to ten percent

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[5](...continued)

5. Pathologic organ changes can be found in almost any organ, but most often involve the liver, brain, peripheral nervous system, and the gastrointestinal tract.

6. The drinking pattern is generally continuous but may be intermittent, with periods of abstinence between drinking episodes.

7. The social, emotional, and behavioral symptoms and consequences of alcoholism result from the effect of alcohol on the function of the brain. The degree to which these symptoms and signs are considered deviant will depend upon the cultural norms of the society or group in which the person lives.

become alcoholic.[6] No one chooses to become an alcoholic or to begin drinking alcoholically. Instead, persons who become alcoholic generally begin drinking for the same reasons as those who are

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[6] See Affidavit of Anne Geller, M.D., at JA 34, 38; Affidavit of Sheldon Zimberg, M.D., at JA 56, 60. Dr. Geller, a medical specialist, and Dr. Zimberg, a psychiatrist, are two physicians widely recognized as experts in the field of alcoholism research and treatment. They summarized the medical and psychiatric professions' current knowledge about and understanding of alcoholism in affidavits submitted to the District Court in support of petitioner Traynor's successful motion for summary judgment.

Dr. Geller is the Medical Director of the Smithers Alcoholism Treatment Center (which is affiliated with St. Luke's/Roosevelt Hospital in New York) and a faculty member of the Columbia College of Physicians and Surgeons. She has conducted research and taught about alcoholism, and treated thousands of those who have suffered from that condition, for twenty years. Dr. Zimberg, a psychiatrist and teaching physician as well, is the author of The Clinical Management of Alcoholism (Brunner/Mazel, New York 1982). He served on the APA advisory committee for Substance Abuse Disorders which helped develop the definition and diagnostic criteria for alcoholism which appear in the DSM-III.

able to remain social drinkers. What distinguishes the two categories of drinkers -- the social drinker and the alcoholic drinker -- is the latter's loss of control over his or her drinking. "In contrast to the social drinker, once alcohol is in his or her system, the alcoholic's ability not to pick up another drink is lost; it is not something over which he or she has conscious or voluntary control." Geller Aff., at JA 43.

Indeed, the American Medical Association has identified this loss of control as the clinical hallmark of alcoholism.[7]

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[7] In its Manual on Alcoholism, supra, at 11, the AMA noted:

> Consumption of very substantial amounts of alcohol ... and frequent intoxication per se are not necessarily equated with alcoholism, even though these signs usually are prominent in the course of the illness. It can happen that some alcoholics actually consume less liquor over a given length of time than do some social drinkers, but

(continued...)

This failure of control is not because the alcoholic is irresolute or morally weak, but because he or she is alcoholic. "Th[e] inability to alter or modify one's drinking pattern or to control intake once begun is a unique feature of alcoholic drinking, and not a part of social drinking." Geller Aff. at JA 43.

The principal characteristic which the two categories of drinkers share is the initial decision to begin consuming alcohol, and it is this feature alone which can accurately be described as willful or volitional conduct. Social drinking of alcoholic beverages is a voluntary act engaged in by most Americans, and is a socially acceptable practice in the United

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[7](...continued)
this fact in itself does not alter the basic condition nor make it less serious. The key factor is in [loss of] control.
Id. at 6. [Emphasis supplied.]

States. No one begins to drink with an intent to develop alcoholism, or with the knowledge that he or she will become alcoholic. It is utterly illogical to label the behavior of engaging in social drinking as "misconduct".[8]

Alcoholism is a complex and progressive disease of insidious onset which typically

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[8] Indeed, many diseases may be triggered by an individual's voluntary behavior. Cigarette smoking may lead to lung cancer, respiratory illnesses and hypertension; eating patterns affect the progress of diabetes; and improper diet or lack of exercise may contribute to the development of heart disease. Yet the Veterans' Administration does not classify these illnesses as the result of "willful misconduct." It is irrational to single out alcoholism for different treatment. In this respect, however, alcoholism is not alone. It was not so long ago that mental illness, too, was labeled as merely bizarre or inappropriate behavior; and that the victims of a variety of mental disorders were also stigmatized and isolated from society rather than treated for their respective disorders.

develops over the course of many years.[9]

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[9] The VA distinquishes between "primary" alcoholism (which is not the result of an underlying psychiatric disorder) and "secondary" alcoholism (which is). But the "primary/secondary" distinction in the VA's regulatory scheme is illusory and clinically incorrect.

First, in the overwhelming majority of cases, alcoholism is not the result or manifestation of some other preexisting or underlying psychiatric disorder. Geller Aff., at JA 43. While many persons suffering from alcoholism present symptoms of depression and anxiety, which occur as the result of alcohol's effect on neurotransmitters in the brain, only some individuals develop alcoholism secondary to a distinct psychiatric disorder. Id. See generally, M. A. Schuckit, M.D., "Genetic and Clinical Implications of Alcoholism and Affective Disorder," 143 Am. J. Psychiatry 140 (1986).

Second, the VA's distinction does not in fact recognize "primary" alcoholism as any kind of disorder or disability but, rather, defines it simply as bad conduct. This definition ignores the fact that, while the medical and psychiatric professions do, indeed, recognize and distinguish beween alcoholism as a primary disorder (i.e., a medical condition that is not accompanied by another psychiatric disorder) and alcoholism as a secondary disorder (i.e., a medical condition accompanied by a separate psychiatric disorder), those professions both recognize primary alcoholism as a distinct disease -- as the VA does not. This fact is re-

(continued...)

As the disease progresses, alcohol becomes more and more essential for the alcoholic to function. "The alcoholic drinker does not drink for enjoyment, but to medicate himself or herself." Geller Aff., at JA 40. Many alcoholics develop not merely a

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[9](...continued)
flected in, among other things, the APA's classification of alcoholism as a distinct substance abuse disorder in the DSM-III. See note 5 supra. Zimberg, The Clinical Management of Alcoholism, supra, at 40; and Schuckit, supra, at 140-143.

Finally, as was pointed out by both experts who offered affidavits in the District Court in Mr. Traynor's case, the kind of diagnosis that is made in the case of any particular alcoholic -- "primary" or "secondary" -- is "to a considerable degree fortuitous." Geller Aff. at JA 44; Zimberg Aff. at JA 65-68. This is because the diagnosis is often a function of the nature of the facility where the individual was treated, and has little to do with the patient's clinical history. Thus, patients who are diagnosed and treated in a psychiatric facility are more likely to be labeled as "secondary" alcoholics, while patients treated in detoxification units of general hospitals are usually given a diagnosis of "primary" alcoholism. Zimberg Aff. at JA 67; Geller Aff. at JA 44. See also Zimberg, The Clinical Management of Alcoholism, supra note 6, at 40.

psychological but a physiological dependency upon alcohol, which is characterized by an increasing tolerance for the drug, and withdrawal upon its discontinuance. Withdrawal may cause anxiety, nausea, irritability, seizures, and even death. Geller Aff., at JA 42. "In essence, the physiologically dependent alcoholic uses the drug alcohol out of pure physical necessity." Zimberg Aff., at JA 65.

Moreover, the alcoholic's increasing dependence upon alcohol, whether psychological or physiological, is not something over which he or she is able to exercise conscious control. As the individual becomes progressively more dependent upon alcohol, the phenomenon of denial sets in. As Dr. Geller explained:

> Denial is an unconscious mental mechanism (unlike lying) by which an individual protects himself from recognizing his increasing need for alcohol and from being aware of the often-devastating consequences of

> its use. Denial is a primitive defense mechanism that all people have and may regress to in order to safeguard themselves against the recognition of something which is threatening to their well-being. It is the ostrich syndrome: I don't see it; therefore it is not there. Denial is a common phenonmenon in childhood; it is also a defense mechanism that adults often regress to when faced with catastrophe, illness or other life-threatening circumstances. Denial is a universal characteristic of alcoholism, and is inevitably present in the alcoholic.
>
> * * * *
>
> It is this combination of gradually increasing dependency and denial that makes alcoholism so insidious an illness: the alcoholic simply does not and cannot let himself recognize what is happening to him.

Geller Aff., at JA 41-42 (emphasis added).

Whether any particular individual who drinks will become an alcoholic is largely the result of forces beyond his or her control. Extensive research has demonstrated that the disease of alcoholism is produced by a confluence of genetic/biochemical, environmental and sociocultural

factors. Geller Aff., at JA 38-40; Zimberg Aff., at JA 60-63.

Research on the genetic component has provided strong evidence that there is an inherited predisposition to developing alcoholism. Individuals with a family history of alcoholism, including parents, siblings, grandparents, uncles and aunts, are at greater risk for developing the disease.[10]

In 1970, a study of the families of 259 hospitalized alcoholics from both a state and a private hospital was per-

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[10] See M. A. Schuckit, M.D., Genetic and Clinical Implications of Alcoholism and Affective Disorder, 143 Am. J. Psychiatry 140, 143-144 (1986). Although research on the genetic component of alcoholism has not been able precisely to determine what it is in an individual's genetic makeup that predisposes him or her to the disease, there is evidence that physical abnormalities in the way these individuals metabolize alcohol may play a role. See Geller Aff., at JA 39. This theory is currently being investigated in order to more fully understand the biochemical nature of alcoholism.

formed. The researchers interviewed first-degree relatives (parents, children, siblings) of the alcoholic individuals, and found that 50 percent of the male first-degree relatives were alcoholic.[11] In another study of half-siblings, children of alcoholic parents raised in foster homes with non-alcoholic parent figures were compared with children without a biological alcoholic parent raised in foster homes with an alcoholic parent figure. For every comparison of the relative influence of having a biological alcoholic parent as opposed to having lived with an adoptive alcoholic parent figure, the biological influence predominated in relation to the development of

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[11] J. Winoker, T. Reich, J. Rimmer et al., "Alcoholism: III Diagnosis and Familial Psychiatric Illness in 259 Alcoholic Probands," 23 Arch. Gen. Psychiat. 104 (1970).

alcoholism.[12] Additional research was conducted on adopted children and twins in Scandinavia. These adoptee studies concerned children of alcoholic families who were adopted away from their biological parents at birth. Those studies showed that, while the incidence of alcoholism among the general population of males in Scandinavia is approximately 7 percent, the incidence of the disease among adoptees with one alcoholic biological parent rose to 25 percent; and, if both biological parents were alcoholic, the incidence of alcoholism in their adopted-away offspring rose to 50 per-

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[12] M. A. Schuckit, D.W. Goodwin & J. Winokur, "A Half-Sibling Study of Alcoholism", 128 Amer. J. Psychiat. 1132 (1972); and see R.J. Cadoret, C.A. Cain, & W. Grove, "Development of Alcholism in Adoptees Raised Apart from Biologic Parents," 37 Arch Gen. Psychiat. 561 (1980). See also Zimberg Aff., at JA 60.

cent.[13]

Another factor contributing to the development of alcoholism is an individual's environmental and sociocultural background. The use of and attitudes towards alcohol differs between and within societies, cultures, subcultures, ethnic, and religious groups. These differences fall within several general types and help to determine general rates of alcoholism.

For example, in groups or societies where drinking is accepted and where drinking practices feature heavy, regular drinking, or drinking-to-drunkeness, individuals tend to be vulnerable to

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[13] M. Bohman, S. Sigvardsson & R. Cloninger, "Inheritance of Alcohol Abuse: Cross-Fostering Analysis of Alcoholic Men", 38 Arch. Gen. Psychiat. 861 (1981). See also M. Bohman, S. Sigvardsson & R. Cloninger, "Maternal Inheritance of Alcohol Abuse: Cross-Fostering Analysis of Adopted Women", 38 Arch. Gen. Psychiat. 965 (1981); and Geller Aff., at JA 39.

developing alcoholism. On the other hand, in societies which encourage total abstinence from alcohol, alcoholism is relatively rare. Finally, in societies where the use of alcohol is accepted within specific settings, rituals, or ceremonial rites, the incidence of alcoholism varies with the degree of controls for strict use and against excesses.[14]

In short, alcoholism is a disease, like many others, that results from a complex combination of genetic predisposition, environmental factors, cultural attitudes and intentional actions having unintended consequences. It is compounded by the addictive nature of the drug alcohol (which, like many other drugs, can lead to both psychological and physio-

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[14] Zimberg, Clinical Management of Alcoholism, supra, at 12 - 14; see also Zimberg Aff., at JA 61-62.

logical dependence), and the compelling phenomenon of denial.

To characterize this medical disorder as the result of "willful misconduct"--or, as the majority opinion in McKelvey v. Turnage put it, as a "willfully caused handicap", 792 F.2d at 200 -- is to completely disregard the known data about the disease, the overwhelming opinion of medical and psychiatric authorities and treatment professionals, and the scientific and medical knowledge that these authorities have developed about alcoholism during the last fifty years.

POINT II: CONGRESS HAS DETERMINED THAT ALCOHOLISM IS AN ILLNESS AND A HANDICAP, AND HAS FORBIDDEN DISCRIMINATION AGAINST ALCOHOLICS

Since 1970, when it enacted the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act, Congress has recognized that "alcoholism is an illness requiring treatment and rehabilitation", 42 U.S.C. §4541(a)(8) (1982), and has sustained a comprehensive federal effort to foster the treatment and enhance the rehabilitation of persons suffering from that illness.[15]

In enacting and extending both the Comprehensive Alcoholism Act and the Rehabilitation Act, Congress has repeatedly noted that the federal legislative commitment to treat alcoholism as a medical

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[15] See Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, Pub. L. 91-616, 84 Stat. 1848, codified as amended at 42 U.S.C. §§ 4541 et seq. (1982) (the "Comprehensive Alcoholism Act").

rather than a moral impairment reflects the long-standing consensus of health authorities about the nature of, and appropriate response to, alcoholism.[16] Congress has also often noted and deplored the lingering social "stigma" and underlying attitudes of blame that persist toward those who suffer from alcoholism.[17]

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[16] See, e.g., S. Rep. No. 91-1069, 91st Cong., 2d. Sess. 1, 3 (1970); S. Rep. No. 96-103, 96th Cong., 1st Sess. 3-4, reprinted in 1979 U.S. Code Cong. & Ad. News, 2681, 2682-83 (noting, when enacting and extending the Comprehensive Alcoholism Act, that by 1968 "alcoholism had been recognized as a disease by the World Health Organization, the American Medical Association, the American Hospital Association, and the American Psychiatric Association"). See also 124 Cong. Rec. S15,569 (daily ed. Sept. 20, 1978) (remarks of Sen. Hathaway).

[17] S. Rep. No. 96-103, 96th Cong., 1st Sess. 15, reprinted in 1979 U.S. Code Cong. & Ad. News 2681, 2694 (discussing 1979 extension of Comprehensive Alcoholism Act); 124 Cong. Rec. S15,567-69 (daily ed. Sept. 20, 1978) (considering 1978 amendments to Rehabilitation Act, described below) (remarks of Sen. Stafford).

In 1973, Congress enacted the first federal civil rights law protecting individuals from discrimination on the basis of handicap: Title V of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791-794a (1982). Section 504 of the Rehabilitation Act provides that "no otherwise qualified individual with handicaps...shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by the law. 29 U.S.C.A. §794 (West Supp. 1987).

That alcoholism is among the "mental or physical impairments" which constitute handicaps for purposes of § 504 was confirmed in 1977 by the United States Attorney General, re-confirmed in 1977 and 1978 by the Department of Health, Education and Welfare, and confirmed yet again

in 1978 by Congress itself.

In 1977, the Attorney General issued an official opinion concluding that "alcoholics...are included within the statutory definition of 'handicapped individuals' for purposes of Title V, which includes the antidiscrimination provision in section 504...." 43 Op. Att'y Gen. No. 12 (1977), at 2. The Attorney General based this opinion on the legislative history of the statute, the statute's broad definition of "handicapped individual", and the "substantial body of authority...that alcoholism and drug addiction are diseases...." Id. at 7.

Subsequently, the United States Department of Health, Education and Welfare, which was charged with the general interpretation and implementation of section 504, issued regulations which also concluded that persons with histories of

alcoholism are "handicapped individuals" within the scope of protection of § 504.[18] HEW's treatment of the issue explicitly recognized "the medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily physical or mental." 42 Fed. Reg. 22,686 (1977).

Finally, in 1978, Congress amended the Rehabilitation Act's definition of "handicapped individual" in order to clarify § 504's coverage of current and recovered alcoholics in the context of employment, and in the course of doing so made the Act's protection of persons with conditions or histories of alcoholism

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[18] See Exec. Order No. 11,914, 3 C.F.R. 117 (1977); 42 Fed. Reg. 22,676, 22,686 (1977); 43 Fed. Reg. 2132, 2134 (1978). See also 45 C.F.R. §85.31 (1985).

explicit.[19] In the debates leading up to the amendment, members of Congress noted once again the "ample evidence that... alcoholics are subject to discrimination in access to benefits, services and employment", and emphasized again that "alcoholism...alone may not be the sole basis for discrimination." 124 Cong. Rec. S15,568, S15,569 (1978) (remarks of Sen. Hathaway) (emphasis supplied).

In its 1978 amendments to the Act, Congress also extended section 504's prohibition against discrimination based on handicap to all federal agencies, including the Veterans' Administration. 1978 Rehabilitation Act Amendments, Pub.

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[19] See the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. 95-602, §122(a)(6), 92 Stat. 2984-85 (1978) ("1978 Rehabilitation Act Amendments"). This was formerly codified at 29 U.S.C. § 706(7)(B) (1982), and is now codified at 29 U.S.C. § 706(8)(B) (West Supp. 1987).

L. 95-602, §119(2), 92 Stat. 2982 (1978), codified at 29 U.S.C. §794 (1982).

These legislative developments leave no doubt that Congress has determined that alcoholism is a disease and that alcoholics are handicapped individuals who may not be denied the benefits of any government program solely because of their handicap.

Indeed, this Court recently pointed to the 1978 amendments and their explicit coverage of alcoholics in reaching its conclusion that § 504 prohibits blanket discrimination against persons with handicaps that may engender fear or disapproval in others:

> [I]n its 1978 amendments...Congress recognized that employers and other grantees might have legitimate reasons not to extend jobs or benefits to drug addicts and alcholics, but also undersood the danger of improper discrimination against such individuals if they were categorically excluded from coverage under the Act. Congress therefore rejec-

> ted the original House proposal to exclude addicts and alcoholics from the definition of handicapped individual, and instead adopted the Senate proposal excluding only those alcholics and drug abusers "whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question..." (citations omitted).

School Board of Nassau Co., Fla. v. Arline, 107 S.Ct. 1123, 1130, n.14 (1987).

The Veterans' Administration's regulation and policy does precisely what Congress has prohibited: by defining alcoholism as "willful misconduct", the VA categorically excludes most alcoholics from using their benefits solely because of their handicap.

POINT III: THE VA'S REGULATION DEFINING ALCOHOLISM AS "WILLFUL MISCONDUCT" VIOLATES § 504 OF THE REHABILITATION ACT

In Arline, this Court recognized that the Rehabilitation Act's broad definition of "handicapped individual" demonstrated

> Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but from 'archaic attitudes and laws'

which reflect continuing public ignorance of and insensitivity to many handicaps. School Board of Nassau Co., Fla. v. Arline, supra, 107 S.Ct. at 1126 (1987). The VA regulation that defines alcoholism as "willful misconduct" is an archaic law stemming from archiac attitudes; it is based on prejudice and ignorance; it violates both the letter and spirit of the Rehabilitation Act.

It is not surprising that the VA's definition of alcoholism as willful misconduct had its origin in a regulation

issued in 1933,[20] during Prohibition, at

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[20] As the Board of Veterans' Appeals pointed out in its final decision denying Mr. Traynor's administrative appeal upon reconsideration, the VA regulation whose conclusive classification of "primary" alcoholism as "willful misconduct" is challenged in this case had its origin in a Presidential regulation issued pursuant to Title I of the Economy Act of 1933:

> [Pursuant to] the Public Law by which Congress initially authorized the President of the United States to promulgate Veterans Administration regulations, Public Law 73-2, [§§ 3, 4, 48 Stat. 8, 9 (1933)] ...President Franklin D. Roosevelt promulgated old Veterans Regulation No. 10, precursor of current regulations, mandating that a disability be held to have resulted from misconduct when it was "[incurred] by an act contrary to the principles of good morals; or as a result of gross negligence, gross carelessness, alcoholism, drug addiction, self-infliction of wounds, etc." (Emphasis supplied.) Since then, a distinction has been maintained between fortuitously incurred disease or disability, for which gratuitous Veterans' Administration benefits may be afforded, and other nonfortuitous disabilities incurred at the hands of the claimant himself....

(86-622 Traynor Cert. Pet. at 118a-119a).

a time when the true nature of alcoholism as a disease was not yet known. Despite the tremendous advances the past fifty years have brought in understanding and treating the disease of alcoholism, the concept of alcoholism as nothing more than one among several sorts of bad conduct has been set in stone by the VA. Indeed, the VA's current concept of alcoholism in 38 C.F.R. § 3.301(c)(2) (1985) is identical to that of the original 1933 regulation.[21]

The effect of this regulation is to deny to alcoholics like Traynor and McKelvey -- solely on the basis of their hand-

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[21] While the agency now makes a distinction between so-called "primary" alcoholism (that which is not a manifestation of an underlying psychiatric disorder) and "secondary alcoholism" (that which is a manifestation of an underlying psychiatric disorder), it continues to define "primary" alcoholism itself as "willful misconduct" per se. See supra, note 9.

icap -- the right to extend their educational assistance benefits, a right that is accorded to all other handicapped veterans.

The VA argues that it is not denying Traynor and McKelvey extensions because of their illness, but rather because it has conclusively determined that their illness was caused by the veterans' behavior. As discussed in Point II above, this outdated view of alcoholism has been flatly rejected both by Congress and by all leading medical authorities, including the American Medical Association and the American Psychiatric Association.[22]

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[22] The ruling of the Court of Appeals in McKelvey v. Turnage below also ignored Congress' explicit recognition that alcoholism is an illness and a handicap for purposes of § 504 of the Rehabilitation Act. Instead, the Court agreed with the VA's contention that its definition of alcoholism as mere misconduct still finds some support "within the field of medicine and within what might be termed the arena

(continued...)

Furthermore, this Court rejected essentially the same argument in Arline. In that case, the school district claimed it had not fired a teacher because she was handicapped, but had fired her because it

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[22](...continued)
of popular moral philosophy". Id., 792 F.2d at 202. That finding and conclusion, however, are fundamentally erroneous.

As discussed in Point II, the overwhelming majority of medical opinion has flatly rejected the concept of alcoholism so readily accepted by the court below. The continuing debate in the fields of medicine, psychiatry, alcoholism treatment and public health generally focuses not on whether alcoholism is or is not a distinct and diagnosable disease -- indeed, both primary and secondary alcoholism are each recognized as separate clinical entitities -- but rather on whether, in any particular individual suffering from it, this illness should appropriately be treated as primarily a medical or a psychiatric disorder.

Indeed, the Congress has acknowleged the existence of this debate, but has deemed it irrelevant for purposes of § 504 whether this handicap is, or is treated as, a medical or a psychiatric impairment. It is alcoholism itself, in whatever form, that Congress has deemed to be a handicap under the Act. See 29 U.S.C. § 706(8)(B), (West Supp. 1987); 42 Fed. Reg 22,686 (1977).

presumed that her illness was contagious. The Court's response to that argument was that "Arline's contagiousness and her physical impairment each resulted from the same underlying [disease]." Id., 107 S.Ct. at 1128. The school district could not, by seizing upon one aspect of the disease, remove it from § 504's protection. It could not put forward "myths and fears about disability and disease" as justification for its discriminatory action. Id., 107 S.Ct. at 1129.

The same reasoning applies in this case. Congress has determined that alcoholism is a handicap and has protected those with that disease from discrimination. The VA cannot argue that it is not discriminating against petitioners as alcoholics, but is denying them benefits because it has conclusively presumed that alcoholism is always caused by willful

misconduct. The physical act of drinking and the impairment caused by alcoholism "result from the same underlying [disease]." The VA cannot, by seizing upon one aspect of the disease of alcoholism -- the fact that it involves a physical act -- remove it from § 504's protection. It cannot put forward "society's accumulated myths and fears" as justification for its discriminatory action.

Yet this is precisely what the majority in McKelvey v. Turnage would permit the VA to do. The majority accepted the VA's ironclad classification of "primary" alcoholism as simply willful "conduct" as a "reasonable" basis for discriminating against those engaging in such "conduct". Id., 792 F.2d 194, 200, 201 (D.C. Cir. 1986) (emphasis in original). Indeed, the majority did exactly what Arline condemned: it looked to "the arena of popular

moral philosophy" and to "general societal perceptions" about alcoholism and found there a basis for justifying the VA's classification of alcoholism as "willful misconduct." Id., 792 F.2d at 201, 202.[23]

The VA regulation challenged in this case perpetuates the long-discredited

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[23] The McKelvey majority also erred in assuming that an agency subject to § 504 need only show a "reasonable" basis for excluding any group of the persons protected by § 504 from any covered program or activity, 792 F.2d at 200. At the very least, § 504 demands a "substantial showing that [a covered agency's exclusionary policy or] regulations are justified", as the District Court in Traynor correctly noted. Traynor v. Walters, 606 F.Supp. 391, 400 (S.D.N.Y. 1985)(emphasis added) (citing New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644, 650 (2nd Cir. 1979)). See also Strathie v. Dept. of Transportation, 716 F.2d 227, 229-231 (3rd Cir. 1983); Bentivegna v. U.S. Dept. of Labor, 694 F.2d 619, 621-22 (9th Cir. 1982); Shirey v. Devine, 670 F.2d 1188, 1204 & n.46 (D.C. Cir. 1982) (discussing § 501 as it relates to § 504); Pushkin v. Regents of Univ. of Colorado, 658 F.2d 1372, 1383-1387 (10th Cir. 1981) (all adopting substantial justification requirement).

myth that alcoholism is the result of misbehavior, no different than deliberatly shooting oneself in the foot. In fact, medical authorities have conclusively established that alcoholism is a disease, and Congress has included alcoholism in the list of handicaps encompassed under the Rehabilitation Act.

Only by ruling that the challenged regulation is illegal under § 504 of the Rehabiliation Act can this Court ensure that veterans with histories of alcoholism who seek to participate in the VA's educational assistance program will have their qualifications for such participation assessed, not on the basis of unfounded "prejudice [or] stereotype", but on the basis of "appropriate findings of fact ..., based on reasonable judgments given the state of medical knowledge" about alcoholism as it is understood today.

Arline, supra, 107 S.Ct. at 1131. Only if this Court thus ensures that these individuals (like all other persons with handicaps within the protection of the Rehabilitation Act) are judged on their individual merits will they finally be assured the "meaningful access" to the VA's educational assistance program, like all other programs covered by the Act, that § 504 was designed to secure. Alexander v. Choate, 469 U.S. 287, 301 (1985).

The VA's regulation flatly violates § 504 of the Rehabilitation Act, and the erroneous ruling and judgment below must therefore be reversed.

CONCLUSION

For the reasons discussed above, the Court should reverse the decision of the D.C. Circuit in McKelvey v. Turnage, reverse the decision of the Second Circuit in Traynor v. Walters, and invalidate the VA's willful misconduct regulation because it violates § 504 of the Rehabilitation Act.

Dated: May 28, 1987

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